Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-1351 and 74-1353

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM DEL TORO, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM J. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
RICHARD L. THORNBURGH,
Assistant Attorney General,
JEROME M. FEIT,
JOSEPH S. DAVIES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	3
Argument	7
Conclusion	20

CITATIONS

Cases:

Bronston v. *United States*, 409 U.S. 352	20
Bruton v. *United States*, 391 U.S. 123	15, 16
Carroll v. *United States*, 16 F. 2d 951, certiorari denied, 273 U.S. 763	10–11
Dennis v. *United States*, 384 U.S. 855	9
Haas v. *Henkel*, 216 U.S. 462	9
Hammerschmidt v. *United States*, 265 U.S. 182	9
Harney v. *United States*, 306 F. 2d 523, certiorari denied, 371 U.S. 911	9–10
Hyde v. *Shine*, 199 U.S. 62	9
Keane v. *United States*, 272 Fed. 577	10
People v. *Ashby*, 17 Misc. 2d 413, 184 N.Y.S. 2d 284	14
People v. *Ezaugi*, 2 N.Y. 2d 439, 161 N.Y.S. 2d 75, 141 N.E. 2d 580	14
Rewis v. *United States*, 401 U.S. 808	10
Sherman v. *United States*, 356 U.S. 369	17
Sorrells v. *United States*, 287 U.S. 435	17
United States v. *Crandall*, 363 F. Supp. 648, affirmed, 493 F. 2d 1401, 495 F. 2d 1369, certiorari denied, 419 U.S. 852	15
United States v. *Crimmins*, 123 F. 2d 271	11
United States v. *Cuevas*, 510 F. 2d 848	13
United States v. *DeSapio*, 435 F. 2d 272, certiorari denied, 402 U.S. 999	16
United States v. *Deutsch*, 451 F. 2d 98, certiorari denied, 404 U.S. 1019	16

588-895—75——1

Cases—Continued:

	Page
United States v. *Feola*, No. 73–1123, decided March 19, 1975	11
United States v. *Frank*, 494 F. 2d 145	16
United States v. *Gill*, 490 F. 2d 233	13
United States v. *Johnson*, 383 U.S. 169	9
United States v. *Keitel*, 211 U.S. 370	9
United States v. *Koonce*, 485 F. 2d 374	11
United States v. *Krogh*, 366 F. Supp. 1255	14
United States v. *Lardieri*, 506 F. 2d 319	13
United States v. *Light*, 394 F. 2d 908	18
United States v. *Mancuso*, 485 F. 2d 275	11
United States v. *Norris*, 300 U.S. 564	20
United States v. *Russell*, 411 U.S. 423	17
United States v. *Thompson*, 366 F. 2d 167, certiorari denied *sub nom. Campbell* v. *United States*, 385 U.S. 973	9
United States v. *Winter*, 348 F. 2d 204, certiorari denied, 382 U.S. 955	12
United States ex rel. Marcus v. *Hess*, 317 U.S. 537	8
United States ex rel. Nelson v. *Follette*, 430 F. 2d 1055	16
Statutes and rule:	
18 U.S.C. 201(a)	3, 8
18 U.S.C. 201(b)	3, 8
18 U.S.C. 371	3, 8, 9, 10
18 U.S.C. 1623	2, 3, 6, 13, 14
18 U.S.C. 1623(d)	3, 14
Organized Crime Control Act of 1970, Title IV, 84 Stat. 932	14
Travel Act, 18 U.S.C. 1952	10
New York Penal Code, § 210.25 (McKinney, 1967)	14
Rule 30, Fed. R. Crim. P	11, 17

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74–1351

WILLIAM DEL TORO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74–1353

WILLIAM J. KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–20)[1] is reported at 513 F. 2d 656.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1975. By order dated March 27, 1975,

[1] All references to "Pet. App." are to the Appendix in No. 74–1353.

Mr. Justice Marshall extended the time for filing the petitions for a writ of certiorari to and including April 28, 1975. The petition in No. 74–1351 (Del Toro) was filed on April 26, 1975; and the petition in No. 74–1353 (Kaufman) was filed on April 28, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' convictions for perjury and conspiracy to defraud the United States are defective because their convictions for bribery were reversed.

2. Whether in order to find petitioners guilty of the conspiracy charged in the indictment the government was required to prove that petitioners acted with an "anti-federal" intent.

3. Whether a person may be convicted of perjury under 18 U.S.C. 1623 on the basis of materially false statements made to a federal grand jury if such person (a) was not informed prior to his first appearance before the grand jury that the government had evidence of certain prior statements made by such person and (b) was not informed until after his first appearance that a grand jury witness may under certain circumstances effectively recant false grand jury testimony, and (c) if the grand jury was not informed that such person had admitted during plea negotiations with an Assistant United States Attorney that he had testified falsely before the grand jury.

4. Whether portions of certain grand jury testimony were introduced at trial in violation of the petitioner Del Toro's right of confrontation.

5. Whether petitioner Del Toro was entrapped as a matter of law.

6. Whether the trial court's review of the evidence and its instructions concerning the perjury charges were proper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; bribery of a public official, in violation of 18 U.S.C. 201(b); and making false statements before a federal grand jury, in violation of 18 U.S.C. 1623.[2] Petitioner Kaufman was sentenced to concurrent terms of four years' imprisonment. Petitioner Del Toro was sentenced to imprisonment for concurrent terms of one year and one day. The court of appeals reversed the bribery convictions on the ground that the person bribed was not a "public official," as that term is defined in 18 U.S.C. 201(a). It affirmed the convictions on all other counts (Pet. App. A–1 to A–20).

---

[2] The jury found petitioner Kaufman guilty on three counts of perjury, three other counts having been dismissed on the ground that Kaufman had subsequently recanted the false testimony forming the basis of those counts. See 18 U.S.C. 1623(d). The jury found petitioner Del Toro guilty on five counts of perjury; he was acquitted on a sixth count of perjury, and a seventh count had been dismissed at the close of all the evidence (Pet. App. A–3).

The evidence introduced at trial is set forth in detail in the court of appeals' opinion (Pet. App. A–3 to A–8). Briefly, the evidence showed that at all times relevant to the conspiracy charged in the indictment, Pedro Morales served as Assistant Administrator of the Harlem-East Harlem Model Cities Program in New York City, a program funded and supervised by the United States Department of Housing and Urban Development (HUD).[3] Sometime in late August 1972, petitioner Kaufman, an attorney and real-estate broker, was introduced to Morales by petitioner Del Toro for the purpose of discussing the possibility of Morales' leasing, on behalf of the Harlem-East Harlem Model Cities Program, office space in a building for which Kaufman was the rental agent. (Del Toro was the Executive Director of an East Harlem anti-poverty agency.) At one point during the meeting, Morales told Kaufman that before leasing the building Kaufman would have to pay him a bribe. Kaufman stated that he had been aware of that possibility and that he would think it over.

On September 1, 1972, Morales was arrested on charges arising out of transactions unrelated to this case. Morales confessed to the role he had played in those transactions, and he agreed generally to assist in an undercover capacity in a joint federal-city investigation into official corruption in the Model Cities Program. Morales subsequently aided investi-

[3] The undisputed evidence at trial showed that 80 percent of the salaries of Model Cities personnel and 100 percent of the other expenses incurred in the operation of Model Cities programs are paid with federal funds (Pet. App. A–9 to A–10).

gators by tape-recording conversations with various individuals having dealings with him in his capacity as a Model Cities administrator. Several of those conversations involved petitioners Del Toro and Kaufman, and the tape recordings revealed that Kaufman agreed to pay Morales $15,000 if Morales leased the building for which Kaufman was the rental agent, that the $15,000 payment was to be disguised as part of the commission paid to Kaufman by the owners of the building, that a commission agreement was actually negotiated that included inflated percentage payments to Kaufman, and that Kaufman paid Morales $500 in cash to bind their agreement.

On February 2, 1973, Kaufman was called before a federal grand jury investigating official corruption in the Model Cities Program. Before testifying, he was advised of his rights and of the fact that he was a target of the grand jury's investigation. After having denied complicity in any corrupt activities, Kaufman was shown boxes containing the tape recordings that had been made by Morales. The Assistant United States Attorney then reminded Kaufman that he was testifying under oath and that he was subject to prosecution for perjury should he be lying. He also asked Kaufman if he wished to change any of his prior testimony, but Kaufman declined to do so. Kaufman did admit subsequently, however, that Morales had asked him for money—but he insisted that he had neither offered nor paid Morales a bribe.

Shortly after his initial appearance before the grand jury, Kaufman met with the Assistant United States Attorney outside the grand jury's presence.

The prosecutor again advised Kaufman of his constitutional rights, and also read relevant portions of the perjury statute (18 U.S.C. 1623) to him, pointing out specifically that the statute permits a witness to recant false grand jury testimony under some circumstances but that recantation is not effective once the fact of perjury has become "manifest." The prosecutor then told Kaufman that tapes existed of certain of his conversations with Morales, whereupon Kaufman admitted having offered to bribe Morales but continued to deny that he had actually paid Morales $500 as a down-payment on the bribe. Kaufman subsequently offered to cooperate with the government in return for complete immunity from prosecution, and he did in fact cooperate until it had become apparent to him that the government was not prepared to grant him full immunity from prosecution in exchange for his cooperation. At no point during his two appearances before the grand jury, following his initial appearance, did he make an effort to correct his prior false testimony.

On February 16, 1973, petitioner Del Toro was called before the grand jury and, prior to testifying, was also informed of his rights and of the fact that he was a target of the grand jury's investigation. Del Toro testified that he knew that arrangements had been made for Kaufman to receive a brokerage fee in connection with the lease by Morales of office space on behalf of the Harlem-East Harlem Model Cities Program. He also testified that he was aware that payoffs were not uncommon among public officials. He denied knowing of any offer of a bribe or payment to

Morales, however, or of having participated in any way in any such transaction. In a subsequent appearance before the grand jury, Del Toro declined to change his earlier testimony although he did admit that he had introduced Kaufman and Morales and that he had been present at their first meeting. He maintained, however, that he had been in a different part of the room when Kaufman and Morales had discussed the possibility of Morales' leasing office space in the building for which Kaufman was the rental agent.

ARGUMENT

Two points about this case are clear beyond doubt: both petitioners repeatedly lied under oath before a federal grand jury and both participated in a scheme to bribe an official of a Model Cities Program. Pressing various contentions, all of which were considered and rejected by Judge Gurfein in his opinion for himself and Judges Friendly and Feinberg, petitioners now seek to have this Court upset their convictions. We will deal below with each of the issues petitioners have raised, but it is significant that in regard to not a single one of those issues does there exist a conflict among the circuits and, indeed, petitioners do not allege otherwise. In these circumstances, there is nothing in this case that would make it worthy of further review by this Court.

1. Both petitioners contend (Kaufman Pet. 13–23; Del Toro Pet. 4–6) that because their bribery convictions were reversed their convictions for conspiracy to defraud the United States must also be reversed. In

588-893—75——2

addition, petitioner Del Toro argues (Pet. 4–6) that reversal of the bribery count requires the reversal of his perjury convictions.

(a). Petitioners were charged and convicted of bribery under 18 U.S.C. 201(b), which proscribes the giving or promising of anything of value to any "public official" with the intent to influence an official act.[4] The court of appeals reversed petitioners' conviction for bribery, holding that Pedro Morales was not a federal "public official," as that term is defined in 18 U.S.C. 201(a). The court's decision in this regard was thus based on statutory interpretation and even if it was correct (but see *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537), it does not follow that petitioners' conspiracy and perjury convictions must also be reversed.

The conspiracy statute that petitioners were convicted of having violated (18 U.S.C. 371) prohibits two or more persons from conspiring "*either* to commit any offense against the United States, *or* to defraud the United States, or any agency thereof in any manner or for any purpose * * *" (emphasis added). Under Section 371, there was no need to find that Morales was a federal "public official." The federal government financed 100 percent of the cost of the Harlem-East Harlem Model Cities Program and 80

[4] The term "public official" is defined in pertinent part in Section 201(a) as an "officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, * * * in any official function, under or by authority of any such department, agency, or branch of Government * * *."

percent of its salaries, and supervised its activities in part. The concern of the United States that the program be free of corruption, through conspiracies such as that entered into by petitioners, was therefore scarcely "indirect and insignificant" as petitioner Kaufman alleges (Pet. 23).[5] See the opinion below (Pet. App. A–14).

It is well settled, moreover, that in regard to a charge of illegally conspiring to defraud the United States, within the meaning of 18 U.S.C. 371, it is irrelevant that the means chosen may not themselves have violated a federal criminal statute or that overtures were not made directly to an employee of the federal government. See *Haas* v. *Henkel,* 216 U.S. 462, 479–480; *Dennis* v. *United States,* 384 U.S. 855, 860–861. See also *Hammerschmidt* v. *United States,* 265 U.S. 182, 188; *United States* v. *Keitel,* 211 U.S. 370, 394; *Hyde* v. *Shine,* 199 U.S. 62, 81; see also *United States* v. *Johnson,* 383 U.S. 169, 173; *United States* v. *Thompson,* 366 F. 2d 167, 169–173 (C.A. 6), certiorari denied *sub nom. Campbell* v. *United States,* 385 U.S. 973; *Harney* v. *United States,*

[5] The conspiracy count of the indictment charged petitioners with having conspired "to defraud the United States and its departments and agencies in connection with the performance of its lawful governmental functions by obstructing and hindering the United States Department of Housing and Urban Development in the impartial, fair and honest distribution of federal funds and by depriving the United States of the faithful and honest services of employees of the New York City Model Cities Administration which was, at all times relevant to this indictment, funded and supervised in substantial part by the United States Department of Housing and Urban Development" (Pet. App. A–13 to A–14).

306 F. 2d 523, 526–527 (C.A. 1), certiorari denied, 371 U.S. 911.[6]

(b). There is nothing to petitioner Del Toro's contention (Pet. 4–6) that his perjury convictions must be reversed because the reversal of his conviction for bribery rendered his false statements immaterial. The grand jury before which Del Toro appeared was engaged in a "continuing investigation into possible corrupt practices of Model Cities personnel and some who dealt with them" (Pet. App. A–16). Both petitioners materially misrepresented during their appearances before the grand jury their respective roles in precisely the type of conspiracy properly the focus of the grand jury's investigation. Those deliberate lies under oath certainly "ha[d] a natural * * * tendency to influence, impede or dissuade the grand jury from pursuing its investigation" and therefore were material. *Carroll* v. *United*

[6] Petitioner Del Toro cites no contrary authority to support his contention that a conspiracy to defraud the United States, under 18 U.S.C. 371, was not established since the means used to further the conspiracy (that is, the bribery of Pedro Morales) did not violate a federal criminal statute. Petitioner Kaufman cites two cases in support of the contention—*Rewis* v. *United States*, 401 U.S. 808, and *Keane* v. *United States*, 272 Fed. 577 (C.A. 4). Neither case is apposite: this Court's decision in *Rewis* turned on the language used by Congress in the Travel Act, 18 U.S.C. 1952, and did not involve the conspiracy statute under which petitioners were charged: *Keane* involved a conspiracy to defraud a military post exchange that was not within the purview of 18 U.S.C. 371, under which petitioners were charged, since the exchange had not been authorized by Congress, Congress had not appropriated any funds to operate the exchange and the federal government was not responsible for either the contents of the exchange or any obligations incurred in the exchange's operation.

States, 16 F. 2d 951, 953 (C.A. 2), certiorari denied, 273 U.S. 763; see also *United States* v. *Koonce*, 485 F. 2d 374, 380–381 (C.A. 8); *United States* v. *Mancuso*, 485 F. 2d 275, 280–282 (C.A. 2).

2. Petitioner Kaufman also argues (Pet. 23–27) that the jury was not adequately instructed that in order to find petitioners guilty of the conspiracy charged in the indictment the government was required to prove that petitioners were aware that the federal government was substantially involved in the operation of the Model Cities Program. Kaufman did not object to the court's instructions to the jury, and he is precluded from doing so now. Rule 30, Fed. R. Crim. P. In any event, Kaufman's contention that the court's careful instruction (see Tr. 1514–1523) was inadequate because it did not require the jury to find that petitioners had acted with an "anti-federal intent" rests entirely on the rule in *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2), which this Court recently rejected in *United States* v. *Feola*, No. 73–1123 (decided March 19, 1975).

3. Petitioner Kaufman contends (Pet. 27–41) that his perjury convictions must be reversed because (a) he was not informed prior to his first appearance before the grand jury that the government had evidence of certain prior statements made by him, (b) he was not informed until after his first appearance that a grand jury witness may under certain circumstances effectively recant false grand jury testimony, and (c) the grand jury was not informed before indicting him for perjury that he had ad-

mitted during plea negotiations with an Assistant United States Attorney that he had testified falsely before the grand jury.

(a). As noted earlier, before Kaufman began testifying before the grand jury he was advised of his rights and of the fact that he was a target of the grand jury's investigation. In the process of taking his oath, he was also advised that he had a duty to testify truthfully. After he had begun testifying, moreover, the Assistant United States Attorney repeated the latter admonition and informed him that he was subject to prosecution for perjury should it be discovered that he was not testifying truthfully. Kaufman's contention (Pet. 28–31) that the government had an additional responsibility to inform him that it had evidence of his involvement in the conspiracy and bribery under investigation is without merit. As the court below correctly stated (Pet. App. A–15):

> There is no duty on the prosecution to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth. * * *

Accord: *United States* v. *Winter,* 348 F. 2d 204, 210 (C.A. 2), certiorari denied, 382 U.S. 955.

(b). Neither did the government have a duty to inform Kaufman during his initial appearance before the grand jury that a witness may under certain circumstances effectively "recant" false grand jury testimony,[7] which is to say that he may lie with impunity so long as he subsequently admits he has done so. Again, petitioner had been sworn and had been repeatedly reminded by the Assistant United States Attorney of his obligation to testify truthfully. Nothing more was required. As the court stated in *United States* v. *Lardieri,* 506 F. 2d 319, 323 (C.A. 3) (on rehearing):

> [D]ismissing perjury indictments where the prosecutor has not given such notice would create a new impediment to successful perjury prosecutions, thereby jeopardizing the deterrent effect Congress specifically sought to establish by rendering perjury convictions easier to obtain. The statutory history, therefore, does not reveal a Congressional intent that prosecutions be dismissed where such warnings are not given.

Accord: *United States* v. *Cuevas,* 510 F. 2d 848, 851–852 (C.A. 2); *United States* v. *Gill,* 490 F. 2d 233, 240–241 (C.A. 7).

(c). Petitioner Kaufman further contends (Pet. 31–37) that the government had an obligation to inform the grand jury that Kaufman had admitted to

[7] Petitioners were charged and convicted under 18 U.S.C. 1623, which provides for the recantation of false testimony as follows: "Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed."

an Assistant United States Attorney, following his first appearance before the grand jury, that some of his grand jury testimony had been false. This is a rather remarkable assertion. It amounts to a claim that petitioner could not be prosecuted for perjury because the prosecutor did not inform the grand jury that petitioner had admitted committing perjury when he testified.

In any event, petitioner Kaufman's admission that he had lied under oath occurred outside the presence of the grand jury and was not therefore an effective recantation under 18 U.S.C. 1623(d). *United States* v. *Krogh*, 366 F. Supp. 1255, 1256 (D. D.C.).[8]

Moreover, following his initial appearance before the grand jury, Kaufman was informed of the recantation provision in 18 U.S.C. 1623 (Kaufman Pet. 11). But during his subsequent appearances he made no effort to take advantage of any opportunity he may have had to correct his earlier testimony,[9] appar-

[8] 18 U.S.C. 1623(d) was adopted by Congress in modified form from the New York Penal Code, § 210.25 (McKinney, 1967), and was enacted as part of Title IV of the Organized Crime Control Act of 1970, 84 Stat. 932. Under New York law, an effective recantation cannot occur outside the presence of the grand jury. *People* v. *Ezaugi*, 2 N.Y. 2d 439, 161 N.Y.S. 2d 75, 141 N.E. 2d 580; *People* v. *Ashby*, 17 Misc. 2d 413, 184 N.Y.S. 2d 284 (Sup. Ct.).

[9] Since Kaufman did not effectively recant his false grand jury testimony, there is no need to consider here whether by the time he admitted to the Assistant United States Attorney that he had testified falsely it had become "manifest" that "such falsity [had] been or [would] be exposed" or whether his false statements had "substantially affected" the grand jury's inquiry. In either event, recantation would not then have been permitted under 18 U.S.C. 1623(d). The court of appeals did note in this

ently, as the court of appeals found (Pet. App. A–18), on advice of counsel after his plea negotiations with the prosecutors had broken down and his brief period of cooperation with the government had come to an end. (Nothing in the record supports Kaufman's suggestion that he did not disclose to the grand jury the extent of his false testimony because he assumed that his admissions to the Assistant United States Attorney constituted an effective recantation under 18 U.S.C. 1623(d).)[10]

4. Petitioner Del Toro contends (Pet. 6–8) that the introduction at trial of portions of Kaufman's grand jury testimony violated the rule announced by this Court in *Bruton* v. *United States*, 391 U.S. 123, since Kaufman did not testify at trial. As the court below held (Pet. App. A–20), the testimony to which Del Toro objects did not contain any inculpatory state-

regard, however, that (Pet. App. A–19): "[T]he prosecutor's placing of boxes of tape recordings on the table in the Grand Jury room [during Kaufman's initial appearance before the grand jury] should have indicated that the time for recantation had come, or at least, did not have long to run. Kaufman thereupon simply made one grudging admission, but he failed to recant his denial that he had bribed and agreed to bribe Morales. Moreover, as indicated, Kaufman later appeared before the Grand Jury again but made no effort to tell it the truth. * * *"

[10] *United States* v. *Crandall*, 363 F. Supp. 648 (W.D. Pa.), affirmed, 493 F. 2d 1401, 495 F. 2d 1369 (C.A. 3), certiorari denied, 419 U.S. 852, upon which petitioner Kaufman relies in support of his argument that his admissions outside the presence of the grand jury represented an effective recantation (Pet. 34–35, note), is of little assistance to him because in that case the defendant was not recalled before the grand jury and he thus was not given any opportunity to recant.

ments regarding Del Toro [11] and, as a consequence, *Bruton* did not preclude its introduction at trial. *E.g., United States ex rel. Nelson* v. *Follette,* 430 F. 2d 1055, 1058 (C.A. 2); *United States* v. *Deutsch,* 451 F. 2d 98, 116 (C.A. 2), certiorari denied, 404 U.S. 1019.

Moreover, Kaufman's grand jury testimony did not fall within *Bruton* since such testimony was in furtherance of the conspiracy in connection with which both Del Toro and Kaufman were subsequently charged. The trial judge found that Kaufman did not terminate his participation in the conspiracy until after his initial appearance before the grand jury (Tr. 1294–1295). Kaufman's grand jury testimony, given only a few days after delivery of the $500 down-payment on the $15,000 bribe Kaufman had agreed to give to Morales, plainly constituted an effort on Kaufman's part to prevent the government from halting the conspiracy before it had reached fruition.[12] See, *e.g., United States* v. *Frank,* 494 F. 2d 145, 155–156 (C.A. 2); *United States* v. *DeSapio,* 435 F. 2d 272, 283–284 (C.A. 2), certiorari denied, 402 U.S. 999.

5. Petitioner Del Toro's contention (Pet. 8–10) that he was entrapped as a matter of law is, as

[11] Indeed, one of the perjury counts on which petitioner Kaufman was convicted charged him with having falsely stated to the grand jury that he had not discussed the making of a bribe with either Morales or Del Toro.

[12] The indictment charged a conspiracy that began on August 1, 1972, and continued until the indictment was filed. The conspiracy count charged overt acts as late as February 14, 1973. The trial judge found that Kaufman's grand jury testimony of February 2, 1973, was in furtherance of the conspiracy (Tr. 1294–1295).

the court of appeals stated, "frivolous" (Pet. App. A–20, n. 10):

> The initial meeting between Kaufman and Morales was arranged by Del Toro and he [Del Toro] was told by Kaufman to carry the message to Morales that Kaufman would split $50,000 less taxes with Morales in exchange for the lease. All this occurred before September 1, 1972, the time when Morales was arrested and began to act as a government undercover agent.

Neither did entrapment occur with regard to the perjury charges against Del Toro. The fact that the government had tape recordings of statements that Del Toro denied having made during his testimony before the grand jury hardly amounts to the government's implanting or promoting a criminal design in the mind of an innocent person. See *United States* v. *Russell,* 411 U.S. 423; *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435.

6. Finally, petitioner Del Toro contends (Pet. 11–12)(a) that the trial court's review of the evidence was imbalanced and (b) that its instructions to the jury concerning the perjury charges were improper because they indicated that ambiguous or even true answers could form the basis for a perjury conviction. Del Toro did not object at trial to the court's charge to the jury, however, and he is therefore precluded from doing so now. Rule 30, Fed. R. Crim. P. In any event, both contentions are unsupported by the record.

(a). The trial transcript reveals that the trial judge was extraordinarily sensitive to the need to maintain

a completely fair and impartial attitude and to refrain from imposing his view of the facts on the jury. The trial judge cautioned the jury at length, for example, that it alone was the judge of the facts and that it should not rely upon what it might perceive as his own reactions to the evidence (Tr. 1499–1500). To the extent that he did summarize the contentions of the prosecution and the defense, the judge accorded petitioner Del Toro's contentions far more than "casual mention" (Del Toro Pet. 11). Indeed, in "selecting that evidence which would most likely aid the jury in putting the case in perspective," *United States* v. *Light,* 394 F. 2d 908, 911 (C.A. 2), the trial judge chose to discuss "the arguments advanced by and on behalf of Del Toro" to illustrate his instructions on the law of conspiracy (Tr. 1517–1519). In that connection, and contrary to petitioner Del Toro's assertion (Pet. 12), the court did *not* assume that the initial meeting between Morales, Del Toro and Kaufman occurred in August, 1972, as contended by the government, but expressly informed the jury that "Del Toro places it between December '71 and February '72" (Tr. 1517). Moreover, the trial judge emphasized Del Toro's claim "that all he intended to do was get Morales off his back and that he never did or intended to do any of the things he told Morales about" (Tr. 1518).[13] By comparison, the court merely

[13] Petitioner Del Toro's suggestion (Pet. 12) that the trial judge entertained doubts about the sufficiency of the evidence of his guilt fails to take account of the judge's statement, made in ruling on defense motions at the end of the case, that, having heard Del Toro testify on his own behalf, "whatever effect it may have on the jury, it has satisfied me that he was, in fact, involved in the conspiracy with Mr. Kaufman * * *" (Tr. 1293).

stated that it was the government's position that petitioner "knowingly acted as intermediary in the negotiations" between Kaufman and Morales (Tr. 1518). Thus, the court's marshalling of the evidence was fair.

(b). Petitioner Del Toro's contention (Pet. 10–11) that the trial judge's instructions to the jury concerning the perjury charges were improper because they indicated that ambiguous or even true answers could form the basis for a perjury conviction is flatly contradicted by the record. At no time did the trial judge erroneously inform the jury that an ambiguous or true answer might support a perjury conviction; rather, he correctly charged that any given perjury count might properly include ambiguous, or even true, answers but that perjury might nevertheless be made out so long as the overall purpose was to deceive and at least one answer contained in the count was in fact false.[14] By imposing upon the government the obligation of establishing general deception in addition to actual and specific falsity, this instruc-

[14] The trial judge instructed the jury concerning the perjury counts in pertinent part as follows (Tr. 1529–1530):

"What you should do is to take each count and ask yourselves two basic questions with respect to them. First, was the overall purpose of the witness to mislead the Grand Jury by the answers given in that count, was that the overall purpose of the witness? If not, if the answer to that is no, that's the end of the matter. If so, are there one or more answers in that count that are both false and were known to the witness to have been false at the time he gave such answers? If you are satisfied beyond a reasonable doubt as to both those propositions you should convict on such count. If you have a reasonable doubt on either, you must acquit.

"Two things I want to emphasize in this regard: First, all the answers in a particular count need not be false. Some may

tion was in fact more favorable to petitioners than the law required. See *Bronston* v. *United States*, 409 U.S. 352; *United States* v. *Norris*, 300 U.S. 564.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.
RICHARD L. THORNBURGH,
Assistant Attorney General.
JEROME M. FEIT,
JOSEPH S. DAVIES,
Attorneys.

JULY 1975.

---

be ambiguous or even true. This, the first element, is satisfied if the overall purpose of the testimony set forth in the count was to deceive. However, at least one answer, and you must agree among yourselves as to which one, at least one answer must be actually false. It's no crime, at least not the crime of perjury, to give misleading testimony if each of the individual answers is true. That is another proposition altogether and we are not concerned with it here.

"So let me repeat: The overall purpose of the count must be to deceive and at least one answer must be false and you must agree among yourselves which answer that is."

U.S. GOVERNMENT PRINTING OFFICE: 1975